Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–106 OF 1996
NIK HASHIM J
12 MARCH 1998

Civil Procedure *— Jurisdiction — Industrial Court — Industrial Court granted respondent award — Failure to consider all statutory requirements in s 30(4) of the Industrial Relations Act 1967 — No finding on applicant's inability to pay — Whether award was erroneous in law — Whether award should be quashed*

The applicant applied for an order of certiorari to quash the award handed down by the Industrial Court in favour of the respondent which granted increased wages and allowance, on the grounds that the Industrial Court acted without jurisdiction and/or erred in law in that it failed to take relevant matters into consideration and that it came to a decision in disregard of the law. In particular, it was argued that the Industrial Court had failed to have regard to s 30(4) of the Industrial Relations Act 1967 ('the Act') when making the award. At the hearing before the Industrial Court, the applicant informed the court that it could not meet any increase in claims. The union contended that the company did not plead financial incapacity to the claims and as such, the company is in a position to meet the claims of the union.

Held, allowing the application:

(1) The Industrial Court has wide powers under s 30(4), (5) and (6) of the Act in settling trade disputes. It can create new rights and obligations between the parties which it considers essential for keeping industrial peace. However, the power to create new rights and obligations must be exercised reasonably and not arbitrarily. Section 30(4) is a statutory requirement which the Industrial Court must take into account when deciding a trade dispute. However, there was hardly any mention in the award that the Industrial Court had ever referred to and taken into account the provisions of s 30(4) in its decision. Section 30(4) is mandatory in its terms by reason of the words 'the court shall have regard to' in the section and thus, failure to adhere to the provision rendered the impugned award erroneous in law (see p 48B–G).

(2) The question of whether the applicant had the capacity to pay was a question of fact for the Industrial Court. However, there was no such finding by the Industrial Court in its award. Thus, the Industrial Court's finding that the award was fair in light of the applicant's inability to meet the union's demands was perverse and arbitrary. In making the award, the Industrial Court failed to direct its mind to the requirements of s 30(4). In order to make the award legally valid under the Act, the Industrial Court must

A make clear and express in its award that all the three elements mentioned in the section have been taken into account. Taking into account only one of the elements without regard to the other two elements is insufficient. Since the disputed award was founded in disregard to the relevant and mandatory provisions of s 30(4), the award was arbitrary and erroneous and not made in
B accordance with the law and thereby exceeding its jurisdiction. This was sufficient to quash the award (see pp 49G–I and 50A–D).

C **[Bahasa Malaysia summary**

Pemohon telah memohon untuk mendapatkan perintah certiorari bagi membatalkan award yang diberikan oleh Mahkamah Perusahaan yang memihak kepada penentang yang telah memberi kenaikan gaji dan elaun, atas alasan bahawa Mahkamah Perusahaan telah bertindak tanpa bidang kuasa dan/atau tersalah pertimbangan di sisi undang-
D undang iaitu ia telah gagal untuk mempertimbangkan perkara-perkara yang relevan dan bahawa ia telah mencapai keputusan tanpa menghiraukan undang-undang. Secara khususnya, telah dihujahkan bahawa Mahkamah Perusahaan telah gagal untuk menimbangkan s 30(4) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') ketika membuat award tersebut. Di pembicaraan di hadapan Mahkamah
E Perusahaan, pemohon memaklumkan mahkamah bahawa ia tidak dapat memenuhi sebarang kenaikan tuntutan. Kesatuan berhujah bahawa syarikat tersebut tidak merayu ketidakupayaan kewangan kepada tuntutan-tuntutan tersebut dan oleh yang demikian, syarikat tersebut berada dalam kedudukan untuk memenuhi tuntutan
F kesatuan.

Diputuskan, membenarkan permohonan:

(1) Mahkamah Perusahaan mempunyai kuasa-kuasa yang luas di bawah s 30(4), (5) dan (6) Akta tersebut dalam menyelesaikan pertikaian perdagangan. Ia boleh mewujudkan hak dan kewajipan
G baru antara pihak-pihak yang mana ia anggap penting demi mengekalkan keamanan perusahaan. Walau bagaimanapun, kuasa untuk mewujudkan hak dan kewajipan baru seharusnya dilaksanakan dengan cara yang munasabah dan bukannya dengan cara timbangtara. Seksyen 30(4) adalah keperluan statutori yang
H mana haruslah diambil kira oleh Mahkamah Perusahaan ketika membuat keputusan pertikaian perdagangan. Namun demikian, tidak sedikit pun disebut dalam award tersebut bahawa Mahkamah Perusahaan pernah merujuk dan mengambil kira peruntukan-peruntukan s 30(4) dalam keputusannya. Seksyen 30(4) adalah mandatori menurut terma-termanya
I disebabkan oleh perkataan-perkataan 'the court shall have regard to' dalam seksyen tersebut dan justeru itu, kegagalan untuk mematuhi peruntukan tersebut menyebabkan award yang dipersoalkan itu salah di sisi undang-undang (lihat ms 48B–G).

(2) Persoalan sama ada pemohon mempunyai keupayaan untuk membayar merupakan persoalan fakta bagi Mahkamah Perusahaan. Walau bagaimanapun, tidak terdapat keputusan yang sedemikian oleh Mahkamah Perusahaan dalam awardnya. Justeru itu, keputusan Mahkamah Perusahaan bahawa award tersebut adalah adil memandangkan ketidakupayaan pemohon untuk memenuhi tuntutan kesatuan adalah berlawanan dan bersifat timbangtara. Dalam membuat award tersebut, Mahkamah Perusahaan gagal menumpukan perhatian kepada keperluan s 30(4). Untuk menjadikan award tersebut sah di sisi undang-undang di bawah Akta tersebut, Mahkamah Perusahaan mestilah menjelaskan dan menyatakan dalam awardnya bahawa ketiga-tiga unsur yang disebut dalam seksyen tersebut telah diambil kira. Dalam mengambil kira hanya satu daripada unsur-unsur itu tanpa menghiraukan kedua-dua unsur yang lain itu adalah tidak memadai. Oleh kerana award yang dipertikaikan telah diasaskan tanpa mempedulikan peruntukan s 30(4) yang relevan dan mandatori, award tersebut adalah salah dan bersifat timbangtara dan telah tidak dibuat menurut undang-undang dan oleh yang demikian melampaui bidang kuasanya. Ini memadai untuk membatalkan award tersebut (lihat ms 49G–I dan 50A–D).]

Notes

For cases on jurisdiction of the Industrial Court, see 2(2) *Mallal"s Digest* (4th Ed, 1998 Reissue) paras 2966–2970.

Cases referred to

Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (refd)
Azman Abdullah v Ketua Polis Negara [1997] 1 CLJ 257 (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)
Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (refd)
Lim Seng Huat lwn Fiamma Sdn Bhd [1996] 3 MLJ 604 (refd)
Malayan Banking Bhd v Association of Bank Officers Peninsula Malaysia & Industrial Court [1988] 3 MLJ 204 (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)
Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor [1991] 2 MLJ 115 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 26(1), 30(4), (5), (6), 33B(1)
Rules of the High Court 1980 O 53

P Jayasingam (*Albar Zulkifly & Yap*) for the applicant.
A Murugavell (*Murugavell Arumugam & Co*) for the respondent.

Cur Adv Vult

Nik Hashim J: A trade dispute between the Kesatuan Pekeria-pekerja Pengangkutan Semenanjung Malaysia ('the union') and Mersing Omnibus Co Sdn Bhd ('the company') was referred to the Industrial Court for an award by the Minister of Human Resources under s 26(1) of the Industrial Relations Act 1967 ('the Act') over the third collective agreement between the company and the union respecting the terms and conditions of service. The Industrial Court handed down the award incorporating a memorandum on terms and conditions of employment between the company and the union for a period of three years from 1 March 1995 to 28 February 1998. Dissatisfied with arts 14, 24, 25, 31 and 33 of the award, the company applied under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash the award that granted increased wages and allowance and enhanced benefits in art 14 (increase in percentage of daily takings by 3%, art 24 (meal allowance of RM10 per night to the employees who are required to stay away from their home base), art 25 (accommodation facilities to the employees who are required to stay away overnight), art 31 (group personal accident insurance for 24 hour coverage for each employee for a sum of RM20,000 with annual premium to be paid equally by the company and the employee), and art 33 (retirement benefits including those who resign after completing five years continuous service), on the usual grounds that the Industrial Court acted without jurisdiction and/or in excess of jurisdiction and/or erred in law in that:

(i) it failed to take relevant matters into consideration;

(ii) it took irrelevant matters into consideration;

(iii) it came to a decision in disregard of the law;

(iv) it applied the wrong test;

(v) it acted in breach of the rules of natural justice; and

(vi) its decision is clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it,

and cited *Malayan Banking Bhd v Association of Bank Officers Peninsula Malaysia & Industrial Court* [1988] 3 MLJ 204 and *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 in support.

The union, on the other hand, argued that the Industrial Court had not committed any jurisdictional error and urged the court not to interfere with the award.

The laws respecting the duty of the High Court in an application for certiorari is well-established. The High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is only concerned with the decision-making process and not with the decision. It is not an appeal from the decision made but a review of the manner in which it was

made and it is not the court's function to consider whether on the merits of the facts of the case, the said decision was fair and reasonable (*Azman Abdullah v Ketua Polis Negara* [1997] 1 CLJ 257; *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305). Judicial review, as the words imply, is not concerned with the merits of a decision but with its legality (see *Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor* [1991] 2 MLJ 115). The Industrial Court has wide powers under s 30(4), (5) and (6) of the Act in settling trade disputes. In settling disputes between an employer and its employees, the Industrial Court is not confined to administration of justice in accordance with law. It can also confer rights and privileges on either party which it considers reasonable and proper though they may not be within the terms of any existing agreement. Its function is not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace (see *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304; *Lim Seng Huat lwn Fiamma Sdn Bhd* [1996] 3 MLJ 604). However, the power to create new rights and obligations must be exercised reasonably and not arbitrarily (see *Viking*). By its terms, s 30(4) is a statutory requirement which the Industrial Court must take into account when deciding a trade dispute. It is a relevant provision. Section 30(4) states:

> In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications, and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

Applying the above principles, there is much merit in the company's argument that the Industrial Court had failed to have regard to s 30(4) when making the award. There is hardly any mention in the award that the learned chairman had ever referred to and taken into account the provisions of s 30(4) of the Act in his decision. Section 30(4) is mandatory in its terms by reason of the words '... the court shall have regard to ...' in the s and hence obligatory. Accordingly therefore, strict compliance of its provision is called for and thus, failure to adhere to the provision renders the impugned award erroneous in law. Authorities have shown that an inferior tribunal, of which the Industrial Court is one, has no jurisdiction to commit an error of law (see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147). If it does make such an error, then it exceeds its jurisdiction, for which an order of certiorari may be issued (*Syarikat Kenderaan Melayu Kelantan Bhd*). There is no degree of nullity and if there is an error of law on which the award of the Industrial Court is founded, such error must necessarily be without jurisdiction or in excess of jurisdiction (see *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18).

The company in its statement in reply at para 4 (p 35 of encl 3) stated as follows:

> The company will at the hearing propose and advance argument as to why the existing terms and conditions should continue to be applicable for the

duration of an award by this honourable court. A copy of the existing collective agreement marked CO1 (Recognition No 103/89) is attached.

At the hearing before the Industrial Court, the company clearly informed the court that the company could not meet any increase in claims. The company's representative, Mr Ng, at p 12 of the notes of evidence in encl 5, said:

> Union's claim for 3% of taking. In RM = RM95,123. Profit is RM16,613. It can create loss. company cannot meet any increase in claim. There are many companies in the same region.

and he continued at p 13 and said:

> In 1994 — profit of RM39,000. Giving 1% increase will cause loss.

After noting that the company's wages are lower than wages in other companies in the region, the Industrial Court proceeded to hold at p 8 of the award:

> Based on the increase on CP1 during the relevant period the employees should get 60% and ⅔ of the increase which is between 15 and 17%. The employees are now getting between 18% and 28% of the daily takings. These need to be increased both to keep up with the level of wages in companies and to offset the increase in the cost of living. A 3% increase from a base of 18% is an increase of about 16% and over the base of 20%, 22% and 28% it would represent a smaller increase. It would appear that the increase of 3% of daily takings as requested by the union would be quite fair as it is between 60% and ⅔ of the increase in CP1 which was 25.7%.

The Industrial Court then proceeded to make the award in art 14 and other claims including the rest of the disputed arts 24, 25, 31 and 33 without any mention and consideration of the provisions of s 30(4) of the Act.

It is the contention of the union before the Industrial Court and this court that the company did not plead financial incapacity to the claims and as such, the company is in a position to meet the claims of the union. The company on the other hand, maintained that it could not meet the union's demands.

In my judgment, the issue of financial incapacity is sufficiently raised from the statement in reply and the notes of evidence before the Industrial Court. Therefore, the question of whether the company had the capacity to pay is relevant. It is a question of fact for the Industrial Court. However, there is no such finding by the Industrial Court in its award. Thus, the Industrial Court's finding that the award is fair in the face of the clear assertion of the company inability to meet the union's demands, in my view, is perverse and arbitrary. In making the award respecting the disputed articles, the learned chairman of the Industrial Court failed to direct his mind to the requirements of s 30(4) of the Act. Section 30(4) is a statutory safeguard which the Industrial Court is obliged to have regard to in making the award relating to a trade dispute. So, in order to make the award legally valid under the Act, the Industrial Court must make clear and express in its award that all the three elements mentioned in the section have been taken

into account and make its findings accordingly. The finding of the Industrial Court that the increase was needed in order 'to keep up with the level of wages in similar companies and to offset the increase in the cost of living', even if taken to mean that the Industrial Court had taken into account the third element of s 30(4) without regard to the other two ie public interest and the financial implications on the company to meet the claims, to my mind, is still insufficient to satisfy the requirements under s 30(4). Since the disputed award was founded in disregard to the relevant and mandatory provision of s 30(4), the award so given is arbitrary and erroneous not made in accordance with the law. That being so, the decision-making process of the Industrial Court is flawed, thereby exceeding its jurisdiction. Hence, the award is not sheltered by the privative clause under s 33B(1) of the Act from judicial review. Indeed, on this ground alone, I consider it sufficient in law for the disputed articles of the award to be quashed. In the event, I do not propose to go into other grounds. The impugned award is a nullity. Therefore, I allow the application with costs and order that the order of certiorari be issued to quash the impugned arts 14, 24, 25, 31 and 33 accordingly.

Application allowed.

Reported by Jafisah Jaafar